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No. 89-108.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

JOHN F. KEHOE, ET AL.,
PETITIONERS,

v.

ROBERT DOBOS,
RESPONDENT.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Question Presented.

I. Whether it was clearly established as of September, 1978 that police supervisors could be liable under 42 U.S.C. § 1983 for constitutional injuries caused by their failure to supervise a subordinate.

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Statement of the Case.

This action was brought in state court under 42 U.S.C. § 1983 by respondent, Robert Dobos, against Massachusetts State Police Trooper Paul Driscoll and four of his supervisors (the petitioners). Dobos was physically and verbally abused by

Driscoll, who had been taken off highway patrol duty twice previously for misconduct (A. 10a).[1]

Because of Driscoll's stature in the troopers' union, the petitioners accorded him special treatment and declined to take him off patrol duty permanently (A. 20a), notwithstanding recommendations from other supervisors to do just that (A. 16a).

The facts supporting the supervisory liability claims are overwhelming.[2] Petitioner Captain Robert Hunt was Driscoll's troop commander, and was responsible for Driscoll's supervision (A. 7a). He admitted it was "common knowledge" that Driscoll's former captain recommended Driscoll "be removed from field operations and have no direct contact with the public" (A. 7a). Driscoll nonetheless was returned for the second time to patrol duty under Hunt's command in October, 1977 (A. 7a). Between his reassignment and the Dobos incident in September, 1978, Hunt "reprimanded" Driscoll "several times" for Driscoll's "behavior toward motorists" (A. 7a). However, he did not recommend *disciplinary* action (A. 7a), or Driscoll's removal from highway duty. Hunt took this course despite the seriousness of Driscoll's "[mis]behavior" (A. 7a-8a), and despite Driscoll's having been taken off highway duty *twice* previously (A. 7a-9a), the second time for violating probationary conditions imposed on him for the first (A. 9a).

Contrary to state police policy (A. 19a), Hunt did not investigate Driscoll's disciplinary history when he recommended

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[1] Citations to the Petitioners' Record Appendix are henceforth abbreviated as "(A. a)."

[2] Petitioners' Statement Of The Case grossly understates respondent's case by omitting reference to facts sustaining the supervisory liability claims, and by minimizing the abuse visited on Dobos by Driscoll. Petitioners also mischaracterize the confrontation between Driscoll and Dobos to make it appear that respondent shared some of the blame. *See* Petitioners' Brief at 7 which states, "Dobos and Driscoll engaged in a heated argument . . ." In fact, Driscoll verbally and physically assaulted Dobos, who "pleaded" with Driscoll to stop. *Dobos* did not "engage in a heated argument" (A. 4a).

no further discipline (A. 8a). Such an investigation would have revealed "several incidents" that caused a former commanding officer to recommend, *in writing*, "that Driscoll be assigned *permanently* to desk duty." (A. 8a) (emphasis added). Hunt admitted, when he later became aware of Driscoll's record, that "Driscoll had not been fit to be on the highway on the date of his encounter with Dobos" (A. 8a).

Petitioner James Canty, lieutenant colonel of the state police, was in charge of "assigning, disciplining, and supervising . . . officers on highway duty. . . ." (A. 9a). Canty testified, incredibly, that he was *not* aware Driscoll had been taken off highway duty twice previously, although Driscoll was returned to the road the second time under Canty's command, and despite the "common knowledge" that Driscoll was a problem trooper (A. 8a-9a). Canty did not investigate Driscoll's disciplinary history even though two substantiated motorist complaints were brought to his attention (A. 10a). Ignoring the seriousness of the complaints (A. 8a), Canty imposed "a verbal reprimand" only (A. 10a).

Petitioner Frank Trabucco, colonel of the state police, knew "Driscoll had disciplinary problems, had been taken off the road twice before, had been reassigned so that he had no public contact, and had not been allowed to drive to work in a cruiser" (A. 10a). Trabucco also knew "Driscoll's captain had recommended . . . that Driscoll should be put in a position where he would have less contact with the public" (A. 10a).

Contrary to state police policy (A. 16a, 19a, 23a), Trabucco acted favorably on Driscoll's request to return to highway duty "without investigating whether Driscoll should have been put back on the road" (A. 10a). At the same time, Trabucco "knew that *several* of Driscoll's former supervisors had recommended that Driscoll be removed from public contact" (A. 24a) (emphasis added).

Trabucco's testimony also suggested that "Driscoll's position as a negotiator for his union may have led [some of his supervisors] to treat Driscoll differently from other officers" (A. 20a).[3] Indeed, Trabucco described the order returning Driscoll to highway duty as unusual (A. 11a).

Petitioner John Kehoe, Commissioner of Public Safety, "was aware of Driscoll's disciplinary problem, that Driscoll was ordered to undergo psychiatric treatment, that Driscoll had been removed from road duty twice by Kehoe himself [A. 24a], that Driscoll had been the subject of a court-martial in connection with . . . assault[ing] . . . his girlfriend" (A. 10a-11a), and that "even while Driscoll was removed from the highway under strict probationary conditions, Driscoll had endangered the public and his fellow officers at Shaeffer Stadium" (A. 24a). Kehoe, however, returned Driscoll to highway duty through an "unusual" order. He did so without probationary conditions (A. 19a) and with "no investigation of Driscoll's disciplinary history" (A. 19a), violating state police policy and practice (A. 16a, 19a, 23a). Kehoe knew "that Driscoll was violent and abusive and that Driscoll had responded to discipline with more misconduct" (A. 24a).

The court below found as follows:

> It is clear that the jury could have concluded that each of the supervisory defendants knew, or should have known, of Driscoll's propensities to abuse and assault members of the motoring public and that, deliberately indifferent to the public safety, they allowed Driscoll to return to highway duty without proper investigation or safeguards.

(A. 25a.)

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[3] The trial transcript (2 Tr. 172-175) connects Trabucco specifically to the testimony referred to by the court at (A. 20a).

Petitioners essentially attempt to retry the case in this Court[4] arguing their conduct was merely negligent and therefore not a proper basis for liability under § 1983. They contend that, unless it is shown they failed to supervise or discipline Driscoll *at all*, they can not be held liable under the deliberate indifference standard.

Alternatively, petitioners argue that, although the doctrine of supervisory liability was clearly established in September, 1978, no case had held a supervisor liable specifically for failing to discipline a subordinate *adequately*. These arguments are without legal or factual foundation and the petition should be denied.

Reasons Why the Petition Should Be Denied.

I. The Decision Below Correctly Stated and Applied the Law of Qualified Immunity; the Principle of Supervisory Liability Was Clearly Established Prior to September 4, 1978.

A. *The Supreme Judicial Court Correctly Stated the Law.*

Petitioners concede that the court below correctly stated the law of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Anderson* v. *Creighton*, 483 U.S. 635 (1987). *See* Petitioners' Brief at page 14. Justice Liacos paraphrased *Harlow* as follows:

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[4] Petitioners raised the qualified immunity defense for the first time at the directed verdict stage, although it is supposed to be raised on the pleadings or, at the latest, at summary judgment. This untimely resort to the immunity defense is an independent basis for denying the petition. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (qualified immunity, as a legal defense, should be resolved early in the case), which was decided before the trial of this case.

> If the law was not clearly established, the supervisors cannot be held responsible for failing to know that their conduct was unlawful. [*Harlow* v. *Fitzgerald*, 457 U.S.] at 818. However, if the law was clearly established and the supervisors failed to prove extraordinary circumstances justifying their lack of knowledge of the law, then the immunity defense fails.

(A. 13a.) This is a proper statement.

Petitioners contend, however, that the court misapplied the qualified immunity concept. They argue the law[5] was not clearly established. Petitioners claim that although the general principle of supervisory liability was well charted, it had not been based precisely[6] on inadequate[7] supervision.

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[5] Whether "the law" was clearly established may confuse the analysis. Decisions fixing the parameters of qualified immunity focus on whether "the *right* the official is alleged to have violated [was] 'clearly established . . .' " *Anderson* v. *Creighton*, 483 U.S. at 640.

Petitioners do not claim that respondent's *rights* to be free from excessive force, verbal abuse, and wrongful arrest and confinement were not clearly established in September, 1978. They argue that liability for *inadequate* supervision was not clearly established. This is essentially an argument about causation (can a supervisor cause a constitution violation perpetrated by a subordinate), which was well settled in 1978. *See Monell* v. *New York Department of Social Services*, 436 U.S. 658, 692 (1978); *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961).

[6] Assuming petitioners are right, which they are not, it would waste this Court's time to engage the exceedingly narrow question whether a species of supervisory liability was clearly established in 1978. The resulting decision would effect few if any cases pending, add nothing to the qualified immunity jurisprudence, and invite certiorari petitions seeking review of lower courts' application of the general principle.

[7] In *Anderson* v. *Creighton*, 483 U.S. 635, the Court resolved the issue implicitly urged upon it by petitioners here: "the level of generality at which the relevant 'legal rule' is to be identified" in assessing whether the law was clearly established.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is *not* to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . .

Id. at 640 (emphasis added).

If the Supreme Court were to review this argument, it would involve only questions of evidence applied under well settled law.

B. *The Case Law Uniformly Established That Supervisory Liability Could Be Based on Inadequate Supervision; the Court Below Correctly Applied the Standard.*

Prior to September, 1978, cases from virtually every circuit specifically held or strongly noted that supervisory liability could be based on *inadequate* supervision.[8] *See, e.g., Kosta* v. *Hogg*, 560 F.2d 37, 40 (1st Cir. 1977) ("if police chief . . . deployed . . . officer under conditions which he should have known would create a threat to the constitutional rights of the citizenry, damages [against him] may well be proper".); *Wright* v. *McMann*, 460 F.2d 126, 134-135 (2d Cir. 1972) (prison warden held liable although lower officials were directly responsible for petitioner's treatment, where evidence permitted inference that warden knew of conditions); *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976) (suit by prisoner against guards and warden might lie against warden if he had knowledge of unanswered request for medical attention or acquiesced in such denial); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (§ 1983 liability

[8] Both the dissenting opinion below and petitioners contend that the court below erred in its application of the qualified immunity test by relying on *Carter* v. *Carlson*, 447 F.2d 358 (D.C. Cir. 1971) (*rev'd on other grounds sub nom. District of Columbia* v. *Carter*, 409 U.S. 418 (1973), *modified*, 489 F.2d 1272 (D.C. Cir. 1974). *Carter* held that police supervisors might be liable for "negligent breach of duty . . .", 447 F.2d at 365, a *standard of proof* that the Circuit Court later renounced and which is eclipsed by this Court's decision in *Canton* v. *Harris*, 109 S.Ct. 1197, 1204 (1989).

However, the court below did *not* rely on the standard of proof, i.e., negligence, articulated in *Carter*. Rather, it cites *Carter* as one of many cases that put police supervisors on notice that they could be held liable, on proper proof, where they *caused* the constitutional violation perpetrated directly by their subordinates.

may lie where police superiors with notice of past culpable conduct failed to prevent recurrence); *Schnell* v. *Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969) (§ 1983 complaint against supervisory police stated claim where it alleged supervisors acquiesced in misconduct of subordinates); *Triplett* v. *Azordegan*, 570 F.2d 819, 823 (8th Cir. 1978) (§ 1983 supervisory liability may lie where supervisor has or is charged with having knowledge that subordinates are causing violations); *Kite v. Kelley*, 546 F.2d 334, 337-38 (10th Cir. 1976) (§ 1983 liability against superiors of FBI agent could lie if they acquiesced in constitutional misconduct); *Delaney* v. *Dias*, 415 F.Supp. 1351, 1354 (D. Mass. 1976) (police commissioner may be liable for excessive force of subordinates where evidence reveals knowledge of abuses); *Cochran* v. *Rowe*, 438 F.Supp. 566, 573 (N.D. Ill. 1977) (complaint against Director of Department of Corrections stated claim for unconstitutional restrictions on exercise of religion where it alleged he "knew [of] or was reckless in failing to discover" violations); *Perry* v. *Elrod*, 436 F.Supp. 299, 303-04 (N.D. Ill. 1977) (complaint against Sheriff stated claim for § 1983 violation where alleged "pattern of subordinate misconduct suggests the inference that a supervisory official with knowledge of the pattern has acquiesced or colluded in it".); *Joseph* v. *Brierton*, 431 F.Supp. 50, 52 (N.D. Ill. 1976) (complaint against supervisor of prison hospital stated claim under § 1983 where it alleged he "was or should have been aware of [unconstitutional] treatment".); *Fialkowski* v. *Shapp*, 405 F.Supp. 946, 951 (E.D. Pa. 1975) (complaint on behalf of retarded children stated § 1983 claim against Secretary of Education and other high ranking state officials where it alleged "general knowledge [of violations] combined with direct supervisory control"); *Moon* v. *Winfield*, 383 F.Supp. 31 (N.D. Ill. 1974) (police chief held liable under § 1983 for failing, despite complaints, to deal with improper conduct of subordinates); *Potts* v. *Wright*, 357 F.Supp. 215,

218 (E.D. Pa. 1973) (§ 1983 complaint stated claim against superintendent of schools and city police chief where it alleged superiors knew or should have known of acts of subordinates and failed to take corrective action); *Landman* v. *Royster*, 354 F.Supp. 1302, 1316 (E.D. Va. 1973) (prison superiors held liable on § 1983 claim for injuries directly caused by subordinates where evidence permitted inference that superiors knew of unconstitutional conduct of subordinates and acquiesced in them); *see also*, Eagan, *The Scope Of Supervisory Liability Under 42 U.S.C. § 1983*, 6 J. Contemp. L. 141, 142-46 (1979).

Against this background the court below properly held that supervisory liability for inadequate supervision was clearly established, and that the petitioners' qualified immunity defense did not lie.

Apart from the case law, 42 U.S.C. § 1983 itself provides that not only those who directly "subject" another to deprivation of a constitutional right may be liable. Those who cause an individual to be subjected to constitutional deprivation are also liable.[9] *Accord Monroe* v. *Pape*, 365 U.S. 167, 187 (1961) (§ 1983 shall be "read against the background of tort liability which makes a man responsible for the natural consequences of his action".) In this light, it was clear before 1978 that a supervisor might incur liability where he *caused* the constitutional violation perpetrated by his subordinate. *Accord Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976) (supervisory liability may be predicated on acquiescence in misconduct of subordinates); *Estelle* v. *Gamble*, 429 U.S. 97, 108 (1976) (remanding case for consideration of supervisory liability); *Monell* v. *New*

[9] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of [law] . . . subjects, *or causes to be subjected*, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

(Emphasis added.)

York Dept. of Social Services, 436 U.S. at 692 ("Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort . . . [under § 1983]").

Finally, limitations on the reach of liability under § 1983 that have concerned this Court have no bearing here. This is not a case where liability attached vicariously, *see Monell*, 436 U.S. at 691 (rejecting § 1983 liability under *respondeat superior*), or under a negligence standard, *see Daniels* v. *Williams*, 474 U.S. 327, 328 (1986) (rejecting § 1983 liability under a negligence standard). In this case respondent proved petitioners knew of Trooper Driscoll's history of culpable conduct toward motorists but nonetheless returned him to patrol duty, thereby causing respondent's constitutional injuries. The petition should be denied.

II. The Distinction Asserted by Petitioners Between Inadequate Supervision and Failure to Supervise Presents Factual Rather than Legal Issues.

Petitioners argue that because they did administer some discipline[10] to Trooper Driscoll, their conduct was at most negligent. *See Daniels* v. *Williams*, 474 U.S. 327 (1986); *Davidson* v. *Cannon*, 474 U.S. 344 (1986). They claim immunity from suit because this Court requires a showing of considerable fault ("deliberate indifference to the rights of the [public]") before subjecting supervisors to liability under § 1983. *See Canton* v. *Harris*, 109 S.Ct. 1197, 1204 (1989). This argument fails because it ignores the jury's conclusion that the discipline administered to Trooper Driscoll was, under the circumstances,

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[10]The difference, if any, between inadequate supervision and failure to supervise is one of degree, not kind. It presents issues of fact, not law. *See Canton* v. *Harris*, 106 S.Ct. at 1205-06 where Justice White employs "failure to train" and "inadequate training" interchangeably.

"grossly negligent amounting to conscious indifference to the safety of the public"[11] (A. 21a).

Petitioners thus would have this Court engage in a detailed examination of the record to determine whether it supports the verdicts. Not only is such analysis inappropriate here, the Supreme Judicial Court's holding is fully supported by substantial evidence. *See* the Statement of the Case, *supra*. In a detailed and careful opinion, Justice Liacos held that "the jury could find . . . [petitioners] chose to ignore Driscoll's history, and, consequently, Driscoll's substantial likelihood of violating constitutional rights of the public" (A. 24a). The petitioners' failure to supervise and discipline Driscoll adequately was a proper basis for liability.

III. The Trial Court's Jury Instructions Completely Conform with Language Approved by This Court.

Petitioners argue that the trial court's jury instructions on supervisory liability allowed imposition of liability under a negligence standard. However, the judge instructed the jury in language from *Languirand* v. *Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied sub. nom. Languirand* v. *Pass Christian*, 467 U.S. 1215 (1985), stating as follows:

> If you find on this evidence that any or all defendants failed to supervise or discipline Driscoll, and said failure to supervise or discipline him constituted gross negligence *amounting to conscious indifference to the safety of the public*, and that this resulted

[11] This Court approved use of the phrase "gross negligence amounting to conscious indifference" as a synonym for "deliberate indifference" in *Canton* v. *Harris*, 109 S.Ct. at 1205 n.7, citing with approval *Languirand* v. *Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied sub. nom. Languirand* v. *Pass Christian*, 467 U.S. 1215 (1985). *See* (A. 21a).

> in the violation of Robert Dobos's constitutional rights, then you should find that they are liable to Mr. Dobos.

(A. 21a)[12] (emphasis added). *Accord Voutour* v. *Vitale*, 761 F.2d 812, 820, 822 (1st Cir. 1985), *cert. den. sub. nom. Saugus* v. *Voutour*, 474 U.S. 1100 (1986) (employing phrases "deliberate indifference" and "conscious indifference" interchangeably); *Fernandez* v. *Chardon*, 681 F.2d 42, 55-56 (1st Cir. 1982), *aff'd sub. nom. Chardon* v. *Fumero*, 462 U.S. 650 (1983). *See also Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). This charge does not remotely suggest liability based on negligence.

Petitioners argue this instruction might have been confused with the charge under the Massachusetts Tort Claims Act.[13] However, the court defined simple negligence at length in an entirely separate section of the charge, and framed each claim in special verdict questions. The instruction makes it plain respondent had to prove that the supervisors' failure to supervise Trooper Driscoll constituted gross negligence amounting to conscious disregard of the public safety to sustain the § 1983 claim. The instruction was clear and proper, and there was no error (A. 22a).

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[12] Appropriately, the trial judge also instructed the jury that respondent had to demonstrate that each petitioner was the "moving force" behind the constitutional injuries perpetrated directly by Trooper Driscoll.

[13] The petition should also be denied because the independent judgment against the Commonwealth under the Massachusetts Tort Claims Act, *for the conduct of the supervisors*, was left undisturbed by a unanimous Supreme Judicial Court.

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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